

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 21 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0174-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ROBERTO VARGAS,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074696

Honorable Terry L. Chandler, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Roberto Vargas

Kingman  
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 After a jury trial, petitioner Roberto Vargas was convicted of driving while under the influence of an intoxicant, endangerment, negligent homicide, and leaving the scene of an accident resulting in death or serious physical injury. On appeal, this court affirmed the convictions and the sentences imposed. *State v. Vargas*, No. 2 CA-CR 2009-0126 (memorandum decision filed Jul. 29, 2010). In his petition for review, Vargas challenges the trial court's order denying his petition for post-conviction relief after an evidentiary hearing on his claims of ineffective assistance of trial counsel. We will not disturb the court's ruling unless it has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). The court did not abuse its discretion here.

¶2 In his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., Vargas asserted the jury instruction for the offense of leaving the scene of an accident involving serious physical injury or death was incomplete because it did not include the specific requirements a driver must fulfill if the driver has been involved in an accident, which duties are set forth in A.R.S. § 28-663. The trial court instructed the jury only that the defendant was required to fulfill "the duty to give information and render aid as required by law." Section 28-661(A), A.R.S., which defines the offense, requires the driver to comply with § 28-663. Vargas argued trial counsel had rendered ineffective assistance in failing to object to the instruction and appellate counsel had been ineffective for not raising the issue on appeal.

¶3 After an evidentiary hearing at which both trial and appellate counsel testified, the trial court denied the petition for post-conviction relief in a thorough, well-reasoned, minute entry evaluating the claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. The court concluded the instruction was incomplete and even though the Revised Arizona Jury Instructions do not include an instruction that specifies the driver's duties under § 28-663, trial counsel nevertheless had performed deficiently by not objecting to the instruction and appellate counsel had performed deficiently by not raising the issue on appeal. But the court found these deficiencies were not prejudicial; it concluded the jury would not have rendered different verdicts if a more complete instruction had been given and the convictions would not have been reversed had the issue been raised on appeal, because the error cannot be characterized as either fundamental or prejudicial. See *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (by failing to object to error in trial court, defendant forfeits right to relief for all but fundamental, prejudicial error).

¶4 On review, Vargas challenges the trial court's denial of relief on his claim of ineffective assistance of trial counsel, essentially restating the arguments he made in his Rule 32 petition and at the evidentiary hearing. Assuming, without deciding, the court was correct that trial counsel's performance had been deficient, the record and the law support the court's finding that the lack of an objection to the instruction was not prejudicial. Vargas has not persuaded this court the trial court abused its discretion in denying relief, and we have no basis for disturbing that ruling.

¶5 We grant the petition for review. But, for the reasons stated, we deny relief.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge\*

\*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.